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Tan Chong Kean v Yeoh Tai Chuan & Anor

B FEDERAL COURT (PUTRAJAYA) — APPEAL NO 02(f)-77–10 OF 2016 (P)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ZAINUN ALI, AZAHAR MOHAMED, AZIAH ALI AND PRASAD ABRAHAM FCJJ
18 DECEMBER 2017

C

Evidence — Privilege — Legal professional privilege — Whether breach of s 126 of the Evidence Act 1950 ('the EA') by solicitor could give his client cause of action — Appellant engaged respondent lawyers to prepare trust deeds on his behalf with express instruction that they were to be kept confidential and destroyed when D *development project completed — Respondents, however, disclosed contents of trust deeds when applying for third party notice to be issued against appellant in suit brought against respondents for payment of money claim — By third party notice respondents sought to recover unpaid legal fees owing to them by Tan including fees for preparation of trust deeds — Whether respondents' breach of s 126 of the EA* E *gave appellant a cause of action for damages and an injunction or whether all appellant could do was lodge complaint against respondents with Advocates and Solicitors Disciplinary Board — Whether it was sufficient if appellant's pleadings had merely mentioned documents to which legal professional privilege claimed without disclosing contents of those documents — Whether s 126 of the EA* F *required client to expressly consent to his solicitor's disclosure of privileged information — Whether consent to disclosure under s 128 of the EA would only operate if specific conditions precedent therein had been satisfied — Evidence Act 1950 ss 126 & 128*

G The appellant ('Tan') agreed to enter into a joint venture with a party ('Bukit Gambier') to develop a piece of land ('the project'). To ensure that his interests in the venture were protected, the first respondent ('Yeoh'), a lawyer who ran a private legal practice in partnership with the second respondent, advised Tan to get the shareholders of Bukit Gambier to execute three trust deeds ('the trust H deeds') in which Tan was the beneficiary. Tan did as he was advised and the trust deeds were prepared by the respondents' firm on Tan's express instruction that the respondents would safeguard their confidentiality and destroy the trust deeds once the project was fully completed. Bukit Gambier completed the project and Tan assumed that all copies of the trust deeds had been destroyed. I He was later shocked to find that the respondents had used copies of the trust deeds to support their application for a third-party notice to be issued against him in a suit in which the respondents were sued by Bukit Gambier for not paying the balance purchase price on a property they had bought in the project. The purpose of adding Tan as a third party was to recover outstanding legal fees

that Tan owed the respondents including the fees for the preparation of the trust deeds. Tan sued the respondents in the High Court for breach of s 126 of the Evidence Act 1950 ('the EA') in disclosing the trust deeds without his express consent. The respondents denied breaching s 126 and alleged that Tan himself had expressly or impliedly waived confidentiality concerning the trust deeds when he disclosed their existence in another court case before a magistrate's court. The High Court decided in Tan's favour ruling that: (a) based on the solicitor-client relationship between the parties, the respondents owed Tan a professional duty to preserve the confidentiality of the trust deeds; (b) the respondents had used the trust deeds for their own benefit, ie, to escape liability to pay Bukit Gambier's claim; and (c) there was no evidence Tan had waived his right to the legal professional privilege concerning the trust deeds. The Court of Appeal ('COA') set aside the High Court's decision holding that a solicitor's breach of s 126 of the EA did not give his client a cause of action against the solicitor but only allowed him to lodge a complaint with the advocates and solicitors' disciplinary board. The COA further held that: (i) s 126 was meant to protect solicitors from being made to disclose to third parties information they had received during a solicitor-client relationship unless the client had expressly consented to the disclosure; (ii) since Tan and the respondents were not parties to the trust deeds there could not be a cause of action for breach of confidential information contained in the trust deeds; (iii) Tan had not sufficiently pleaded with particulars the alleged breach of confidential information committed by the respondents; and (iv) the High Court was wrong to have granted Tan damages or ordered damages to be assessed when there was no proof that Tan had suffered any injury as a result of the disclosure of the trust deeds by the respondents. In the instant appeal against the COA's decision, Tan was granted leave to appeal on the following questions of law: (A) whether a solicitor's breach of s 126 of the EA gave the client a cause of action against the solicitor to obtain an injunction to restrain disclosure of confidential information; (B) whether (as held by the COA) the client's only recourse on a solicitor's breach of s 126 was to lodge a complaint against the solicitor with the Advocates and Solicitors Disciplinary Board; (C) whether a solicitor sued for a debt in his personal capacity could in his defence rely on confidential information reposed in him in his capacity as a solicitor; (D) whether in a court action for breach of solicitor-client privilege, it was sufficient if the client merely pleaded the breach without disclosing the contents of the privileged document; and (E) whether s 126 of the EA by using the words 'unless with his client's express consent' rejected the concept of an implied waiver at common law.

Held, allowing the appeal, setting aside the decision of the COA, granting an injunction to restrain the respondents from disclosing and using the trust deeds in their possession, ordering all copies of the trust deeds in the respondents' possession to be delivered up to Tan within seven days, ordering the respondents not to retain any facsimile or photocopy of the trust deeds and

ordering the respondents to pay Tan damages as assessed by a High Court judge:

(1) There was a clear violation by the respondents of the prohibition stipulated in s 126 of the EA. The privilege accorded by s 126 belonged to the client and not to the solicitor. The solicitor was legally obliged to protect not only any form of information he had obtained from the client but also all advice he had given to the client. Tan and the respondents had a client-solicitor relationship when the trust deeds were prepared and Tan had instructed the respondents that the trust deeds should remain confidential and should be destroyed when the development of the land was completed by Bukit Gambier. The respondents disclosed the existence of the trust deeds without obtaining Tan's express consent. The copies the respondents kept were used when all should have been destroyed upon the completion of the development project. Moreover, the respondents had used the trust deeds for their own advantage, ie, to seek indemnity from Tan by way of a third-party notice application in relation to a monetary claim made against them by Bukit Gambier. The respondents' claim that there was no disclosure of the trust deeds to a third party was contrary to the fact that indeed those documents were used and filed in court in the respondents' application for the third-party notice (see paras 25 & 33–36).

(2) The court did not agree with the respondents' contention and the COA's finding that Tan had no cause of action under s 126 of the EA and that the breach of that section merely entitled him to lodge a complaint with the relevant disciplinary body. Section 126 was not a mere rule of evidence but a principle of fundamental justice. A breach of that principle entitled an aggrieved party to commence an action including a prayer for an injunction to safeguard the confidentiality of the client-solicitor communication. It was even more critical when such confidential information was used to the advantage of the solicitors who were legally obliged to protect it (see paras 37–39).

(3) There was no merit in the respondents' contention on the pleadings point. If Tan had disclosed the contents of the trust deeds in his pleadings, it would have been construed as him having abandoned his privilege. As such, it was sufficient that Tan had merely mentioned in his pleadings those documents which he claimed were covered by client legal privilege (see para 40).

(4) Section 126 of the EA dictated that an express consent had to be given by a client before the client legal privilege was considered waived. There was no evidence to show Tan had given a clear and unmistakable consent tantamount to an express consent for the trust deeds to be disclosed. Hence, the condition precedent in s 126 was never met (see paras 43–44).

(5) The respondents' reliance on implied consent under s 128 of the EA was misconceived and without merit. Even under the second limb of s 128, which was relied upon by the respondents, there were conditions precedent — first, the client had to be the party calling the advocate as a witness in a suit or proceeding. Secondly, the client had to question the advocate 'on matters which but for such question he would not be at liberty to disclose'. In the magistrate's court case, Tan did not call the first respondent as a witness. He was the defendant in that suit and gave evidence on his own behalf. Thus, the first condition precedent was not satisfied. Although Tan's counsel in that case cross-examined the first respondent, it was not within the ambit of the second limb of s 128. Indeed, based on the respondents' submission, the magistrate was only concerned with the pleading point and not the client legal privilege issue. In fact, Tan when questioned refused to answer about the trust deeds on the ground of client legal privilege (see paras 45–48).

[Bahasa Malaysia summary

Perayu ('Tan') bersetuju untuk memasuki usahasama dengan satu pihak ('Bukit Gambier') bagi memajukan sebidang tanah ('projek tersebut'). Bagi memastikan agar kepentingannya dalam usahasama itu dilindungi, responden pertama ('Yeoh'), seorang peguam yang menjalankan amalan perundangan secara perkongsian dengan responden kedua, telah menasihati Tan untuk mendapatkan pemegang-pemegang saham Bukit Gambier untuk melaksanakan tiga surat ikatan amanah yang disediakan oleh firma responden-responden berhubung arahan nyata Tan bahawa responden-responden akan dilindungi kerahsiaan mereka dan memusnahkan surat ikatan amanah itu setelah projek tersebut telah siap sepenuhnya. Bukit Gambier telah menyiapkan projek tersebut dan Tan mengandaikan bahawa semua salinan surat ikatan amanah itu telah dimusnahkan. Dia kemudian terkejut apabila mendapati bahawa responden-responden telah menggunakan salinan-salinan surat ikatan amanah itu untuk menyokong permohonan mereka bagi notis pihak ketiga dikeluarkan terhadapnya dalam guaman yang mana responden-responden disaman oleh Bukit Gambier kerana tidak membayar baki harga belian hartanah yang telah dibeli oleh mereka dalam projek tersebut. Tujuan menambah Tan sebagai pihak ketiga adalah untuk mendapat balik fi perundangan yang tertunggak yang Tan terhutang kepada responden-responden termasuk fi utuk persiapan surat ikatan amanah itu. Tan telah menyaman responden-responden di Mahkamah Tinggi kerana pelanggaran s 126 Akta Keterangan 1950 ('AK') kerana mendedahkan surat ikatan amanah itu tanpa persetujuan nyatanya. Responden-responden menafikan telah melanggar s 126 dan mengatakan bahawa Tan sendiri telah secara nyata dan tersirat mengetepikan kerahsiaan berkenaan surat ikatan amanah itu apabila dia mendedahkan kewujudan mereka dalam kes mahkamah lain di hadapan mahkamah majistret. Mahkamah Tinggi memutuskan untuk menyebelahi Tan dengan membuat keputusan bahawa:

A (a) berdasarkan hubungan peguamcara-anak guam antara pihak-pihak, responden-responden mempunyai kewajipan profesional kepada Tan untuk mengekalkan kerahsiaan surat ikatan amanah itu; (b) responden telah menggunakan surat ikatan amanah untuk faedah mereka sendiri, iaitu, bagi melepaskan liabiliti untuk membayar tuntutan Bukit Gambier; dan (c) tiada B keterangan yang Tan telah mengetepikan haknya terhadap perlindungan profesion perundangan berkaitan surat ikatan amanah itu. Mahkamah Rayuan ('MR') telah mengetepikan keputusan Mahkamah Tinggi dengan memutuskan bahawa pelanggaran peguamcara s 126 AK tidak memberikan anak guamnya kausa tindakan terhadap peguamcara tetapi hanya C membenarkannya untuk membuat aduan dengan lembaga tatatertib peguambela dan peguamcara. MR selanjutnya memutuskan bahawa: (i) s 126 bermaksud untuk melindungi peguamcara daripada didedahkan kepada maklumat pihak ketiga yang telah diterima oleh mereka sepanjang hubungan peguamcara-anak guam kecuali anak guam itu telah secara nyata bersetuju D dengan pendedahan itu; (ii) oleh kerana Tan dan responden-responden bukan pihak-pihak kepada surat ikatan amanah itu tidak mungkin terdapat kausa tindakan kerana pelanggaran maklumat kerahsiaan yang terkandung dalam surat ikatan amanah itu; (iii) Tan tidak mempli secukupnya butiran yang dikatakan telah melanggar kerahsiaan maklumat yang dilakukan oleh E responden-responden; dan (iv) Mahkamah Tinggi telah terkhilaf apabila memberikan Tan ganti rugi atau memerintahkan ganti rugi ditaksir apabila tiada bukti bahawa Tan mengalami apa-apa kecederaan akibat pendedahan surat ikatan amanah itu oleh responden-responden. Dalam rayuan ini terhadap keputusan MR, Tan telah memberikan kebenaran untuk merayu berhubung F persoalan-persoalan berikut: (A) sama ada pelanggaran peguamcara berhubung s 126 AK memberikan anak guam kausa tindakan terhadap peguamcara untuk memperoleh injunksi bagi menghalang pendedahan maklumat kerahsiaan itu; (B) sama ada (sepertimana diputuskan oleh MR) satu-satunya jalan keluar anak guam berhubung pelanggaran s 126 G paguamcara adalah untuk membuat aduan terhadap peguamcara itu dengan Lembaga Tatatertib Peguambela dan Peguamcara; (C) sama ada peguamcara telah menyaman untuk hutang dalam kapasiti peribadinya boleh dalam pembelaannya bergantung kepada maklumat kerahsiaan yang dibebankan kepadanya dalam kapasitinya sebagai peguamcara; (D) sama ada dalam suatu H tindakan mahkamah untuk pelanggaran perlindungan peguamcara-anak guam, ia adalah tidak mencukupi jika anak guam hanya mempli pelanggaran tanpa mendedahkan kandungan dokumen yang dilindungi; dan (E) sama ada s 126 AK dengan menggunakan perkataan-perkataan 'unless with his client's express consent' telah menolak konsep penepian tersirat dalam common law.

I

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan MR, memberikan injunksi untuk menghalang responden-responden daripada mendedahkan dan menggunakan surat ikatan amanah itu dalam milikan mereka, memerintahkan semua salinan surat ikatan amanah dalam milikan

responden-responden dihantar kepada Tan dalam tempoh tujuh hari, memerintahkan responden-responden tidak mengekalkan apa-apa faksimili atau fotokopi surat ikatan amanah itu dan memerintahkan responden-responden membayar Tan ganti rugi sepertimana ditaksir oleh hakim Mahkamah Tinggi:

(1) Jelas terdapat pelanggaran oleh responden-responden tentang larangan yang dinyatakan dalam s 126 AK. Perlindungan yang diberikan oleh s 126 dimiliki oleh anak guam dan bukan peguamcara. Peguamcara diwajibkan secara sah melindungi bukan hanya apa-apa bentuk maklumat yang diperolehinya daripada anak guam tetapi juga semua nasihat yang telah diberikan kepada anak guam itu. Tan dan responden-respoden mempunyai hubungan anak guam-peguamcara apabila surat ikatan amanah itu disediakan dan Tan telah mengarahkan responden-responden agar surat ikatan amanah itu patut kekal rahsia dan patut dimusnahkan apabila pembangunan tanah itu telah siap oleh Bukit Gambier. Responden-responden telah mendedahkan kewujudan surat ikatan amanah itu tanpa memperoleh persetujuan nyata Tan. Salinan-salinan yang disimpan oleh responden-responden telah digunakan apabila semua patut dimusnahkan setelah projek pembangunan itu siap. Tambahan pula, responden-responden telah menggunakan surat ikatan amanah itu untuk kelebihan mereka sendiri, iaitu, untuk mendapatkan indemniti daripada Tan melalui permohonan notis pihak ketiga berkaitan tuntutan wang yang dibuat terhadap mereka oleh Bukit Gambier. Tuntutan responden-responden bahawa tiada pendedahan surat ikatan amanah kepada pihak ketiga adalah bertentangan dengan fakta bahawa memang dokumen-dokumen tersebut digunakan dan difailkan di mahkamah dalam permohonan responden-responden untuk notis pihak ketiga (lihat perenggan 25 & 33–36).

(2) Mahkamah tidak bersetuju dengan hujah responden-responden dan dapatan MR babhawa Tan tiada kausa tindakan di bawah s 126 AK dan bahawa pelanggaran seksyen tersebut hanya memberi hak kepadanya untuk membuat aduan dengan badan tatatertib yang relevan. Seksyen 126 bukan hanya rukun keterangan dan bukan prinsip keadilan asas. Suatu pelanggaran prinsip tersebut memberi hak kepada pihak yang terkilan untuk memulakan tindakan termasuk permohonan untuk injunksi bagi melindungi kerahsiaan hubungan anak guam-peguamcara. Ia lebih kritikal jika maklumat kerahsiaan digunakan untuk kelebihan peguamcara yang bertanggungjawab secara sah untuk melindunginya (lihat perenggan 37–39).

(3) Tiada merit dalam hujah responden-responden berhubung poin pliding itu. Jika Tan telah mendedahkan kandungan surat ikatan amanah itu dalam plidingnya, ia mentafsirkan seperti dia telah melepaskan

perlindungannya. Oleh itu, ia adalah mencukupi untuk Tan hanya menyatakan dalam plidingnya dokumen-dokumen tersebut yang didakwanyanya dilindungi oleh perlindungan sah anak guam (lihat perenggan 40).

(4) Seksyen 126 Ak menyatakan bahawa persetujuan nyata perlu diberikan oleh anak guam sebelum perlindungan sah anak guam diambil kira telah diketepikan. Tiada keterangan untuk menunjukkan Tan telah memberikan persetujuan jelas dan tidak dapat disangkal yang sama seperti persetujuan nyata untuk surat ikatan amanah didedahkan. Justeru, prasyarat dalam s 126 tidak dipenuhi (lihat perenggan 43–44).

(5) Kebergantungan responden-responden berhubung persetujuan di bawah s 128 AK telah disalah tanggap dan tanpa merit. Malah di bawah cabang kedua s 128, yang mana digunakan oleh responden-responden, terdapat prasyarat — pertama, anak guam perlu menajdi pihak yang memanggil peguambela sebagai saksi dalam guaman atau prosiding. Kedua, anak guam perlu menyoal peguambela 'on matters which but for such question he would not be at liberty to disclose'. Dalam kes mahkamah majistret, Tan tidak memanggil responden pertama sebagai saksi. Dia adalah defendan dalam guaman tersebut dan telah memberikan keterangan bagi pihaknya sendiri. Oleh itu, prasyarat pertama tidak dipenuhi. Walaupun peguam Tan dalam kes itu telah memeriksa balas responden pertama, ia bukan dalam skop cabang kedua s 128. Malah, berdasarkan hujah responden-responden, majistret hanya mengambil berat tentang poin pliding itu dan bukan isu perlindungan sah anak guam. Bahkan, Tan apabila disoal enggan menjawab tentang surat ikatan amanah itu atas alasan perlindungan sah anak guam (lihat perenggan 45–48).]

Notes

For cases on legal professional privilege, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2832–2857.

Cases referred to

B and others v Auckland District Law Society and another [2003] 2 AC 736, PC (refd)

Berd v Lovelace (1576) 21 ER 33 (refd)

Buttes Gas and Oil Co and another v Hammer and another (No 3) [1981] QB 223, CA (refd)

Canada (Attorney General) v Federation of Law Societies of Canada (2015) SCC 7; [2015] 1 SCR 401, SC (refd)

Dato' Anthony See Teow Guan v See Teow Chuan & Anor [2009] 3 MLJ 14, FC (refd)

Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors [1989] 3 MLJ 445, HC (refd)

Expandable Ltd & Anor v Rubin [2008] EWCA Civ 59, CA (refd)

Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd [2010] 1 SLR 833, HC (refd)
Goddard and another v Nationwide Building Society [1987] QB 670, CA (refd)
Goldberg v Ng (1995) 185 CLR 83, HC (refd)
In The Matter Of Lee Wah Cane Furniture Pte Ltd [1984] 1 MLJ 156 (refd)
International Power Industries NV, Re [1985] BCLC 128, QBD (refd)
Lord Ashburton v Pape [1913] 2 Ch 469, CA (refd)
Low Chi Yong (t/a Reynox Fertichem Industries) v Low Chi Hong & Anor [2018] 1 MLJ 175, FC (refd)
Regina v Secretary of State Home Department, ex parte Leech (No 2) [1994] QB 198, CA (refd)
Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others [2009] 1 SLR 42, HC (refd)
Yeo Ah Tee v Lee Chuan Meow [1962] 1 MLJ 413, CA (refd)

Legislation referred to

Evidence Act 1950 ss 126, 128
Evidence Act 1995 [WA]

Appeal from: Civil Appeal No P-02–1415–08 of 2014 (Court of Appeal, Putrajaya)

Cyrus Das (Raj Shankar with him) (Kumar & Co) for the appellant.
Muhammad Shafee Abdullah (Wan Aizuddin Wan Mohammed and S Abishaya with him) (Shafee & Co) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] This appeal deals with one but an important issue, that is, the scope of solicitor-client professional privilege as stipulated in ss 126 and 128 of the Evidence Act 1950 ('s 126' and 's 128' respectively).

[2] On 11 October 2016 this court granted leave to appeal on the following questions:

(a) whether a breach of s 126 of the Evidence Act 1950 on legal professional privilege by a solicitor gives rise to a cause of action against him by the client to obtain an injunction to restrain any disclosure of confidential information by him or whether, as stated by the Court of Appeal, the client is confined to a complaint to the Advocates and Solicitors Disciplinary Board for breach of solicitor-client privilege?

(b) whether a solicitor sued in his personal capacity for a debt could rely on confidential information reposed in him in his capacity as solicitor as a defence to the debt?

(c) whether for the purposes of an action in court for breach of solicitor/client privilege it is sufficient for the client to plead the breach without disclosing the contents of the privileged document? and

(d) whether s 126 by the use of the words 'unless with the client's express consent' rejects the concept of an implied waiver at common law?

[3] In this judgment unless otherwise stated the appellant is referred to as the plaintiff while the two respondents as the defendants collectively or the first and second defendant respectively.

[4] The plaintiff commenced an action against the defendants who were sued as partners in the legal firm of Messrs TC Yeoh & Co ('the legal firm') alleging breach of their responsibility as solicitors under s 126. The High Court decided in favour of the plaintiff but the Court of Appeal reversed that decision. Hence this appeal before this court.

[5] We heard the appeal on 12 July 2017 and 30 August 2017 and reserved our judgment. This is the unanimous judgment of the court.

BACKGROUND FACTS

[6] The plaintiff was a shareholder of a company, Pan Palace Holdings Sdn Bhd, the registered owner of a piece of land situated at Sungai Dua, Penang ('the said land'). The plaintiff wanted to develop the said land. A company, Bukit Gambier Land Sdn Bhd ('Bukit Gambier') whose shareholders were Chow Yu Teck ('Chow'), Lim Kim Huat ('Lim') and Cheong Ho Kuan ('Cheong') agreed to undertake the development by way of a joint venture. The development project was known as Pan Palace Plaza.

[7] In order to ensure that he would not lose the said land in case Bukit Gambier failed to carry out the development, the plaintiff was advised by the first defendant to get the shareholders of Bukit Gambier execute three trust deeds ('the trust deeds') with the plaintiff as the beneficiary. The advice was followed and the legal firm prepared the documents and had them duly executed. Legal fee in the preparation was charged to the plaintiff.

[8] It was agreed between the plaintiff and the legal firm that upon the successful completion of the development the trust deeds would be destroyed.

[9] Bukit Gambier successfully developed the said land and the plaintiff assumed that all copies of the trust deeds were destroyed.

[10] The defendants purchased one unit of shophouse in Pan Palace Plaza at the purchase price of RM605,000 ('the purchase price'). The defendants financed it by way of 80% bank loan and the balance of RM121,000 ('the said sum') was payable by them.

[11] Apart from preparing the trust deeds, the legal firm had done other legal works for the plaintiff and the total legal fees came up to RM183,050.

[12] The defendants did not pay the said sum. Bukit Gambier therefore commenced an action in the Sessions Court in Georgetown, Penang to recover the said sum.

[13] The defendants disputed the claim and also applied for a third party notice to issue to the plaintiff in relation to the unpaid legal fees including the fee for preparing the trust deeds. It was in relation to the third party notice and the reference to the trust deeds that this present suit was filed relying on s 126.

[14] Basically, the defendants denied any breach of s 126. They averred that there was no issue of breach of confidentiality since it was the plaintiff who first disclosed the existence of the trust deeds in another court case before the Magistrate's Court in Penang (vide Summons No 72–3367 of 2009) ('the magistrate's court case'). As such it was contended that there was already an express or implied waiver made by the plaintiff in respect of the trust deeds.

BEFORE THE HIGH COURT

[15] In relation to s 126 this is what the High Court said, inter alia:

> The defendants had used this information for their own benefit. The defendants tried to escape liability to pay the balance purchased price as claimed by Bukit Gambier.
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> To my mind, the defendants owed a professional duty to preserve the confidential information imparted during the subsistence and after the relationship. The trust deeds were generated during the solicitor-client relationship between the plaintiff and the defendants.
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> The plaintiff had clearly expressed that he refuse to answer whether there is a trust deed because of the solicitor-client privilege. I do not see how the plaintiff had waived his right to privilege.
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> In my view, the plaintiff did come to court with clean hands when he applied for an injunction. The defendants are the ones who had misused the confidential information which they kept and had as a solicitors for the plaintiff.

[16] Hence, the High Court found in favour of the plaintiff and made the following orders:

> In the circumstances, the plaintiff's claim is allowed with cost of RM30,000. For exemplary damages, I am awarding RM50,000 as a reminder to the defendants that they should not breach their fiduciary duty and professional duty as stated in s 126 of the Evidence Act 1950. I am also awarding general damages which is to be assessed before the registrar. Interest of 5% on general damages after assessment of damages by the registrar. No interest as to the exemplary damages.

BEFORE THE COURT OF APPEAL

[17] In reversing the judgment of the High Court the Court of Appeal said these, inter alia:

> [3] We have perused the statement of claim several times but were not able to find any statement in the pleading which can sustain a cause of action under s 126 of the Evidence Act 1950. A claim for confidential information is different from the protection given to client and solicitors under s 126 of the Evidence Act 1950. The difference is not even like of an apple to an orange but the distinction is that of a rock and a fruit. Breach of confidential information can form a cause of action. However, we were doubtful whether s 126 of the Evidence Act 1950 can give rise to a cause of action. On the date of hearing, we found the submission was not satisfactory and directed parties to submit further, on this issue.
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> [4] At the outset we must say that the Evidence Act 1950 ('the EA 1950') is a procedural law related to trial in this country. As a general rule, a breach of any of the sections under the Evidence Act will not give rise to a cause of action per se. Section 126 is meant to be a protection given to the solicitors not to disclose information between solicitors and clients as stated in the section to third parties and not among themselves. It has nothing to do with confidential information or the definition or jurisprudence thereof.
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> ...
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> [5] ...
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> The phrase, 'No advocate shall at any time be permitted', clearly shows that a solicitor is not allowed to disclose any information relating to clients in the course of his professional employment without the client's consent. That is to say, a third party to the trial cannot force disclosure and/or the solicitor will be protected by the court to refuse disclosure. If not for the existence of s 126, solicitors may be liable for contempt if the courts order disclosure and the solicitors fail to do so or failure to disclose may trigger s 114(g) of the EA 1950 which relates to adverse inference.
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> ...
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> [11] We have read the memorandum of appeal, the record of appeal and the able submission of the parties. After giving much consideration to the submission of learned counsel for the defendants, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(i) we note that the plaintiff and the defendants were not parties to the trust deed and in consequence there could not be a cause of action for breach of confidential information per se as per the pleadings;

(ii) in our considered view, the learned High Court judge misdirected herself in failing to appreciate the long line of authorities relating to 'confidential information' as well as pleading rules. The plaintiff's failure to plead the cause of action with the particulars on the face of record makes the suit *fait accompli*;

(iii) on the issue whether solicitor-client privilege under s 126 of the EA 1950 will apply for the plaintiff to anchor a cause of action, we were not appraised with a comprehensive submission on this issue despite the fact we have given parties time to submit. In our considered view, s 126 of the EA 1950 will not entitle the plaintiff to anchor a cause of action. However, if a solicitor breached solicitor-client privileges without the consent of the clients, it can be a subject matter of complaint to the advocates' disciplinary board. The breach, if sufficiently serious, may result in the solicitors being struck out from the roll of advocate and solicitor. We do not wish to deal with the issue whether there can be a cause of action against a solicitor in the manner pleaded by the plaintiff for breach of solicitor-client privileges, save to say:

(a) in the instant case, it involves a dispute between clients and solicitors and/or has nexus. In consequence, s 126 of the EA 1950 will not be applicable. Support for the proposition is found in a number of cases and academic writings. ...

(iv) for a client to succeed in an action based on improper disclosure, he must prove that he actually suffered injury. Pure disclosure itself does not entitle the clients to seek damages as per the old cases (see *Taylor v Blacklaw* 3 Bing NC 235). In the instant case, there was no finding by the learned trial judge that the plaintiff had actually suffered damages which the plaintiff has quantified damages as RM100m which on the face of record as well as the facts will appear to be an abuse of process of court. The trial court on such facts at the case management stage itself should have inquired to determine whether indeed it was an abuse of the court process, if so, it must give the litigant notice to amend, failing which the suit should be struck out. Abuse of process is not a matter that the court should entertain (see *Charles Forte Investment Ltd v Amanda* [1963] 1 Ch D 240);

(v) it is a wrong exercise of discretion for the trial court to order assessment of damages in the instant case when there was no finding that the plaintiff suffered injury. In addition, it will be a wrong exercise of discretion to order assessment of general damages only before the Registrar when parties have not requested the court to deal with liability only. Even if parties had requested the court to deal with the issue of liability only, unless they intend to settle the matter amicably on the issue of quantum, the court is obliged to hear the issue as to liability as well as quantum. The issue of liability as well as quantum is part and parcel of the obligation of trial court.

BEFORE THIS COURT

Submissions of parties

[18] In his submission learned counsel for the plaintiff dealt with the first two leave questions together. But before addressing them specifically he made the following points, namely, that:

(a) there was no basis for the defendants to disclose the trust deeds since the claim against them personally was made by Bukit Gambier and not by the plaintiff;

(b) there was no piercing of veil of incorporation applied for in the action by Bukit Gambier against the defendants;

(c) the defendants could have sued for the legal fees allegedly owed by the plaintiff personally and which had nothing to do with Bukit Gambier;

(d) there was no nexus between the alleged legal fees and the balance of the purchase price of the unit bought by the defendants from Bukit Gambier. The defendants had therefore mixed their professional and private roles;

(e) the trust deeds were related to a collateral private arrangement between the owner of the said land and the shareholders of Bukit Gambier;

(f) the defendants in their capacity as solicitors were not entitled for any purpose to rely on any information obtained from their clients as solicitors. Any information obtained through solicitor/client relationship is privileged information to be treated as absolute unless there was an express waiver by their clients;

(g) the privilege is absolute and belongs to the client. It applies to the full unless there is fraud. And there is no issue of any enquiry to be held in balancing between the public interest in disclosure and the private rights of protection enjoyed by the client;

(h) the trust deeds were not pleaded by the defendants in their statement of defence in the action by Bukit Gambier;

(i) s 126 is a statutory protection given to a client and not to his or her solicitor; and

(j) the defendants are 'accountable for their admitted breach of s 126 which is a mandatory obligation imposed on them as solicitors'.

[19] Specifically for leave questions 1 and 2 learned counsel submitted that:

(a) the Court of Appeal made a fundamental error in construing s 126 as 'protections given to solicitors' when in law 'the privilege belongs to the

client and not to his lawyer' citing the case of *B and others v Auckland District Law Society and another* [2003] 2 AC 736 and *Sarkar's Law of Evidence* (Malaysian Edition) (2016, Vol 3) at p 3210;

(b) the principle of solicitor/client privilege or legal professional privilege is not 'merely as a shield against discovery but as affording the right to mount a cause of action to restrain its breach'. A 'breach of solicitor/client privilege by a solicitor or a third party is actionable by an injured client'. The cases cited are *Lord Ashburton v Pape* [1913] 2 Ch 469; *B and others v Auckland District Law Society and another*; *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445; *Goddard and another v Nationwide Building Society* [1987] QB 670; *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others* [2009] 1 SLR 42 and *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833;

(c) solicitor/client privilege or legal professional privilege is not a mere rule of evidence. 'It is a fundamental condition on which the administration of justice as a whole rests' citing the case of *B and others v Auckland District Law Society and another*;

(d) 'a solicitor is not expected to abuse the information in his knowledge and part with it merely because he is summoned to do so' — *In The Matter Of Lee Wah Cane Furniture Pte Ltd* [1984] 1 MLJ 156;

(e) 'since the privilege belongs to the client, the lawyer cannot invoke it for his own benefit if the privilege is waived by the client' — *Re International Power Industries NV* [1985] BCLC 128 at p 138; and

(f) 'in a case of blatant abuse of the privilege' by a solicitor 'for his own purpose in defending a claim against him in his personal capacity, it is a travesty of justice if the injured client is not able to take legal action to prevent the wrong being done'.

[20] In respect of leave question 3 learned counsel for the plaintiff submitted that:

(a) the plaintiff was wholly right in not pleading the contents of the trust deeds as he would then run the risk of express waiver of the privilege claimed — *Buttes Gas and Oil Co and another v Hammer and another (No 3)* [1981] QB 223; and

(b) the Court of Appeal erred in 'equating solicitor/client privilege exclusively with confidentiality' and then erroneously 'applied the principles relating to the law of confidentiality to decide if the pleading was sufficient'.

[21] For leave question 4 learned counsel for the plaintiff argued that there could not have been any express waiver given because:

(a) it is an established principle that 'there could be no waiver of privilege except with the express consent of the client. The doctrine of implied waiver at common law is not statutorily recognised under s 126' — *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14;

(b) s 128 (second limb) of the Evidence Act 1950 does not apply in this case since the client has not called upon the solicitor to give evidence. As such implied waiver does not arise;

(c) the Court of Appeal misread the magistrate's court case notes of proceedings where it was clearly recorded the plaintiff refused to answer a question on a trust deed on the ground of solicitor/client privilege. Further, the issue of legal fees has nothing to do with the contents of the trust deeds;

(d) the Court of Appeal failed to invoke or apply s 128 of the Evidence Act 1950 where it is stated expressly that 'If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126'; and

(e) in mere one sentence the Court of Appeal ruled that there was a waiver by the plaintiff of the solicitor/client privilege.

[22] In response to the above learned counsel for the defendants submitted that:

(a) the plaintiff and the defendants were in a solicitor-client relationship. But the plaintiff 'is seeking to prevent' the defendants from revealing the trust deeds 'that establish and/or prove' that the plaintiff 'had been lying and/or misleading the court in his claim' against the defendants. To allow him to do so would enable the plaintiff to unfairly profit using his lies;

(b) the trust deeds are already within the public domain. The plaintiff had expressly, deliberately and intentionally waived the privilege during the trial, as recorded in the magistrate court's case notes of proceedings. There was no appeal. The trust deeds 'are revealed and open to the public as they are henceforth contained in public court records';

(c) 'by the third party proceedings in Sessions Court Summons No 52–3367 of 2008, against which there is no pending appeal', the plaintiff 'did not raise confidentiality or privilege and the Penang High Court on 30 June 2010 in Appeal No 12A-270 of 2010, the trust deeds, 'are now within the public domain';

(d) there was non-disclosure of material facts by the plaintiff when he applied for interim injunction, namely: (i) the trust deeds were already included in the agreed bundle of documents in the preparation of trial in the sessions court and the plaintiff did not seek to have them removed during the injunction application in the High Court; (ii) the plaintiff was brought in as a third party for indemnity in relation to the trust deeds and Bukit Gambier; and (iii) that the plaintiff had deliberately and intentionally and expressly waived his privilege through his counsel in the magistrate's court case brought by the plaintiff against the defendants;

(e) having failed in his appeal before the High Court to set aside the third party notice which has connection with the trust deeds and Bukit Gambier the plaintiff did not further appeal;

(f) the contents of the trust deeds do not meet the requirements of confidentiality. Further, the plaintiff had already intentionally and deliberately waived any confidentiality in those documents during the magistrate's court case between the same parties. As such the plaintiff is no longer entitled to rely on privileged communication;

(g) the plaintiff does not satisfy the necessary legal principles required to apply for injunction. The plaintiff has come to court with unclean hands having failed to disclose material facts and perjured including his witness Chow Yu Tek. As such the balance should be in favour of not granting the injunction applied for;

(h) s 126 does not give rise to a cause of action but may only provide for qualified defence;

(i) in respect to leave question 1 the 'Court of Appeal had rightly decided' that s 126 does not give rise to an independent cause of action but merely entitled the plaintiff to complain before the Advocates and Solicitors Disciplinary Board. 'To date, there has been no case law and or authorities in support' of s 126 being relied upon to mount a cause of action. It only 'gives rise to a qualified defence';

(j) for leave question 2 'the parties to the so called confidential information are the same parties in this action hence there is no breach of so called confidential information to third parties. As such the defendants by virtue of not being third parties should on a balance be entitled to disclose the so called confidential information to court';

(k) for leave question 3 the 'failure and for omission and/or neglect' of the plaintiff 'in merely pleading the breach and in not disclosing the contents of the breach ie the privileged document goes against the laws governing pleadings';

(l) for leave question 4 it is not relevant in this appeal whether s 126 rejects

A the concept of implied waiver at common law. The plaintiff had expressly given waiver when his counsel cross-examined the first defendant during the hearing in the magistrate's court case on matters which but for such question he 'would not be at liberty to disclose. The 'fact that the said trust deeds by virtue of being contained in court
B records automatically render them public domain';

(m) the Court of Appeal 'had rightly decided that s 126 of the Evidence Act 1950 was a procedural privilege to be used as a shield and not a sword, ie not relied upon to mount a cause of action but rather as a qualified
C defence. The confidentiality exist for the protection of the information given by the client to the solicitor so that the solicitor cannot be compelled to reveal those confidential information that would be detrimental to his client, to third parties. The confidentiality is not for the purpose of allowing the client to perjure in order to gain benefit from
D his solicitor';

(n) the issue of the 'trust deeds as alleged' by the plaintiff as being privileged document protected by solicitor/client privilege or client confidentiality does not arise as the disclosure was not to third parties. As such there was
E no breach of s 126; and

(o) the 'Court of Appeal had rightly held that the failure and/or omission and/or neglect' by the plaintiff in pleading or disclosing the contents of the trust deeds went against the laws governing pleadings.

F DECISION OF THIS COURT

[23] Section 126 reads:

(1) No advocate shall at any time be permitted, unless with his client's express
G consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such
H employment:

Provided that nothing in this section shall protect from disclosure —

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such
I showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

Explanation — The obligation stated in this section continues after the employment has ceased. A

[24] On plain reading of s 126 it is clear that in order for it to apply the following prerequisites must be present, namely: B

(a) there must exist a solicitor-client relationship between the parties; and

(b) there exist communication in any manner or of any subject made by the client to the solicitor in the course and for the purpose of the employment of the solicitor and/or advice given by the solicitor to the client. C

[25] The privilege belongs to the client and not that of the solicitor (see: *B and others v Auckland District Law Society and another*). As such in Australia it is now statutorily called the 'client legal privilege' instead of 'legal professional privilege' (see: Australia Evidence Act 1995 (Commonwealth)). The solicitor is therefore legally obliged to protect not only any form of information he has obtained from the client but also all the advice he has given to the client. D

[26] But the privilege may be waived only with the express consent given by the client. Further, the privilege does not cover any communication between the client and the solicitor that is for the furtherance of any illegal purpose or any fact tantamount to commission of fraud or crime as observed by the solicitor in the course of his employment. E F

[27] The principle in s 126 was postulated centuries ago as an English common law principle in the case of *Berd v Lovelace* (1576) 21 ER 33 in which the full report reads:

Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed, touching the same; and that he shall be in no danger of any contempt, touching the not executing of the same process. G H

[28] The rationale in the principle is to enable and protect an individual's ability to access to the justice system with complete disclosure of all necessary information to his legal adviser free from any hindrance in the form of fear that any disclosure by him of any communication may prejudice him in the future. I

[29] The courts regard client legal privilege as a 'substantive general principle which plays an important role in the effective and efficient administration of justice by the courts' (see: *Goldberg v Ng* (1995) 185 CLR 83).

[30] In *Regina v Secretary of State Home Department, ex parte Leech (No 2)* [1994] QB 198 Steyn LJ said this at p 211:

> Legal professional privilege is therefore based on an important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice. It is not without significance that counsel could not refer us to a single instance where subordinate legislation was employed, let alone successfully employed, to abolish a common law privilege where the enabling legislation failed to authorise the abolition expressly.

[31] In the Canadian case of *Canada (Attorney General) v Federation of Law Societies of Canada* (2015) SCC 7; [2015] 1 SCR 401 the Supreme Court (per LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ and delivered by Cromwell J) held that:

> Lawyers must keep their clients' confidences and act with commitment to serving and protecting their clients' legitimate interests. Both of these duties are essential to the due administration of justice
>
> ...
>
> ... The expectation of privacy in solicitor-client privileged communications is invariably high regardless of the context and nothing about the regulatory context of the Act or the fact that a regulatory agency undertakes the searches diminishes that expectation. ... Solicitor-client privilege must remain as close to absolute as possible. There must be a stringent norm to ensure protection and legislative provisions must interfere with the privilege no more than absolutely necessary.
>
> ... It should be recognized as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Principles of fundamental justice have three characteristics. They must be a legal principle; there must be significant societal consensus that they are fundamental to the way in which the legal system ought fairly to operate; and, they must be sufficiently precise so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The lawyer's duty of commitment to the client's cause meets this test. First, it is a normative legal principle and a basic tenet of our legal system. It has been recognized as a distinct element of a lawyer's broader common law duty of loyalty. Second, jurisprudence demonstrates that the principle is sufficiently precise to provide a workable standard. It does not countenance a lawyer's involvement in, or facilitation of, illegal activities and it is consistent with a lawyer taking appropriate steps to ensure that his or her services are not used for improper ends. Third, there is overwhelming evidence of a strong and wide-spread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause. The duty is fundamental to the solicitor-client relationship and how the state and the citizen interact in legal matters. The lawyer's duty of commitment to the client's cause is essential to maintaining confidence in the integrity of the administration of justice.

[32] Nearer home in the Singapore case of *In The Matter Of Lee Wah Cane Furniture Pte Ltd* cited by learned counsel for the plaintiff the court acknowledged the sanctity of client legal privilege. It was held that in law a court order could not be sustained which compelled a solicitor to disclose or be examined on information obtained while acting for a client. A solicitor may assist in providing information which he has become acquainted in the course of his professional employment so long as it is 'within his capacity and within the bounds of professional privilege' unless he has been expressly instructed or authorised by his client to do so.

[33] In the present case there is no denial that the relationship between the plaintiff and the defendants at the material time was one of client-solicitor. It is also not in dispute that arising from that relationship and on the advice of the first defendant given when sought for by the plaintiff the trust deeds were prepared and executed. It was also the instruction of the plaintiff to the defendants and not denied that the trust deeds must remain confidential and to be destroyed upon the successful completion of the development of the said land by Bukit Gambier.

[34] Unfortunately, the defendants disclosed the existence of the trust deeds without obtaining an express consent from the plaintiff. The copies the defendants kept were used when all should have been destroyed upon the successful completion of the development in the said land.

[35] Moreover the defendants utilised the trust deeds for their own advantage. They used them to seek for indemnity from the plaintiff by way of a third party notice application in relation to a monetary claim made against them by Bukit Gambier. The claim by the defendants that there was no disclosure of the trust deeds to a third party is also contrary to the fact that indeed those documents were used and filed in court in relation to application by the defendants for third party notice.

[36] Thus, in our view there was a clear violation by the defendants of the prohibition stipulated in s 126.

[37] The next issue is whether such a breach is actionable by an aggrieved client? In this case the use and disclosure of the information was for the benefit of the defendants. Learned counsel for the defendants submitted that the plaintiff has no cause of action under s 126. It merely enables him to lodge a complaint with the relevant disciplinary body.

[38] With respect, we are not inclined to agree with learned counsel for the

defendants. Section 126 is not a mere rule of evidence. It is a principle of fundamental justice. Surely a breach of such principle entitles an aggrieved party to commence an action including a prayer for an injunction to safeguard the confidentiality of the client-solicitor communication. It is even more critical when such confidential communication is used to the advantage of the solicitors who are legally obliged to protect it. Hence, the principle of law as submitted by learned counsel for the plaintiff is the correct proposition of law on this issue.

[39] We are therefore of the view that the Court of Appeal erred in its finding on the foregoing issue.

[40] As regards the pleadings point, we find there is no merit in the submission of learned counsel for the defendants. If the plaintiff had disclosed the contents of the trust deeds in his pleadings it would have been construed as him having abandoned his privilege. As such it was sufficient that the plaintiff merely mentioned in his pleadings those documents in which he claimed to be covered by client legal privilege.

[41] In *Buttes Gas and Oil Co and another v Hammer and another (No 3)* [1981] QB 223 Donaldson LJ said this at p 252E–F:

> It must be right that a bare reference to a document in a pleading does not waive any privilege attaching to it as otherwise there would be no scope for taking objection under RSC, Ord 24, r 11(i), when a notice was served under rule 10(1). If, on the other hand, a document is reproduced in full in the pleading, its confidentiality is gone and no question of privilege could arise. Where the line is to be drawn between these two extremes may be a matter of some nicety, but I do not think that it is necessary to reach a conclusion in the present case which does not, in my judgment, turn on so narrow an issue as waiver in relation to the few documents which are referred to in the pleadings.

(See also: *Expandable Ltd & Anor v Rubin* [2008] EWCA Civ 59).

[42] On the issue of waiver learned counsel for the defendants relied heavily on the magistrate's court case in particular on the cross-examination of the first defendant by counsel for the plaintiff in that proceeding. He submitted that it was an express waiver and if not, an implied waiver under s 128.

[43] Section 126 dictates that an express consent must be given by a client before the client legal privilege is considered waived. In *Low Chi Yong (t/a Reynox Fertichem Industries) v Low Chi Hong & Anor* [2018] 1 MLJ 175 this court opined the meaning of express consent at para 46 thus:

> *Black's Law Dictionary* (edited by Bryana A Garner, Deluxe 9th Ed) states that 'consent' means 'Agreement, approval, or permission as to some act or purpose, esp given voluntarily by a competent person; legally effective assent. 'Express consent' means 'Consent that is clearly and unmistakably stated' whereas 'Implied consent' means 'Consent inferred from one's conduct rather than from one's direct expression. Without the need of an exhaustive and laborious research, consent entails permission given by a competent person.

[44] In this instant case there is no evidence to show that the plaintiff gave a clear and unmistakable consent which tantamount to an express consent for the trust deeds to be disclosed. Hence, the condition precedent as stipulated in s 126 was never met (see: *Yeo Ah Tee v Lee Chuan Meow* [1962] 1 MLJ 413).

[45] As to the reliance on implied consent under s 128 by learned counsel for the defendants we also find it to be without any merit.

[46] Section 128 reads:

> If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.

[47] An implied consent has to be 'inferred from one's conduct rather than from one's direct expression'. In this case learned counsel for the defendants argued that there was evidence. However, his reliance on s 128 appears to be misconceived. There are two limbs in s 128. Learned counsel is relying on the second limb, that is, '... if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose'. But even in the second limb there are also condition precedents stipulated. Firstly, the client must be the party calling the advocate as a witness in a suit or proceeding. Secondly, the client 'questions the advocate on matters which but for such question he would not be at liberty to disclose'.

[48] In the magistrate's court case the plaintiff did not call the first defendant as a witness. He was the defendant in that suit. He gave evidence on his own behalf. Thus, even the first condition precedent was not satisfied. And although the counsel for the plaintiff in that case cross-examined the first defendant it was not within the ambit of the second limb of s 128. Indeed based on the

submission of learned counsel for the defendants the learned magistrate was only concerned on the point of pleading and not on client legal privilege issue. In fact it was the plaintiff when questioned earlier on refused to answer about the trust deeds on the ground of client legal privilege.

[49] Meanwhile, the Court of Appeal found there was a disclosure when it said this:

> It is important to note that the plaintiff in a civil suit magistrates court vide Summons No 72–3437 of 2009 had by himself disclosed the existence of the trust deeds.

[50] Unfortunately, there was no discussion or analysis on whether the Court of Appeal was relying on s 126 or s 128 in coming to such a finding.

[51] In respect of the other points raised by learned counsel for the defendants in his submissions such as the plaintiff did not disclose all material facts when he applied for an interim injunction and that he came to court with unclean hands thereby the balance of convenience should be to refuse an injunction as prayed for, we find that these points are not relevant in answering any of the leave questions. And even if we were to deal with each of them our findings would not make any difference to our conclusion in this appeal.

CONCLUSION

[52] Our answer to leave question 1 is that in respect of the first part it is in the affirmative and for the second part it is in the negative. Our answer to leave question 2 is in the negative. For leave question 3 our answer is in the affirmative and for leave question 4 our answer is also in the affirmative.

[53] In the upshot we allow with costs this appeal and set aside the judgment and orders of the Court of Appeal. We hereby make the following orders:

(a) an injunction to restrain the defendants from disclosure and use of the trust deeds in their possession;

(b) all copies of the trust deeds in the possession of the defendants be delivered up to the plaintiff within seven days from the date hereof;

(c) the defendants are not to retain any facsimile or photocopy of the trust deeds; and

(d) an order for damages to be assessed by a High Court judge in Penang and paid by the defendants to the plaintiff.

Order accordingly.

Reported by Ashok Kumar